SUPREME COURT, U. S.
FILED
OCT 26 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,
Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,
Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,
Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor Defendant-Appellee.

MOTION TO AFFIRM

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Intervenor Defendant-Appellee.

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Statement

This action was brought under 42 U.S.C., §1983, against the District Attorney of New York County and the Director

of Purchase of the City of New York. The Attorney General of the State of New York intervened in support of the defendants.

This class action sought to enjoin the defendants from doing acts pursuant to New York State General Municipal Law, Section 103-b, and other New York laws of similar purport, alleging that the plaintiffs were, by such acts, being deprived of their right, under the Fifth and Fourteenth Amendments of the United States Constitution, not to incriminate themselves. Plaintiffs also sought to have these State laws declared unconstitutional.

Motions by the plaintiffs for an interlocutory injunction and for summary judgment were referred to a three-judge court. That court denied the motions, and it stayed the action pending resort to State court proceedings by the plaintiffs. This appeal is from that order.

The Motions

(1)

The affidavits in support of the motions state that: The plaintiffs are officers of milk companies engaged in the sale and distribution of milk in the New York City area. They and other milk company executives appeared, pursuant to subpoena, before a grand jury. Before entering the grand jury room they were shown blank forms of waivers of immunity and were told they would be asked to sign them. On advice of lawyers who were present with them, they stated that they would not sign the waivers. Before the grand jury they were advised that it was investigating

bribery, coercion, extortion, conspiracy and price rigging in the milk industry. They were warned about General Municipal Law, Section 103-b, and its application in the event that they should refuse to waive immunity. They refused to sign waivers. Some, at least, did this after leaving the room and consulting their attorneys. They were not asked any specific question relating to any transaction, contract or bid with the State of New York or any of its political subdivisions.

The affidavits also assert that the statement made to them concerning the General Municipal Law provision was regarded by them as threatening them and their companies with economic loss.

They state that a list of companies whose officers refused to waive immunity was sent to various governmental officials including the appellee Adler. It is also stated that two of the companies, although they were the lowest bidders, were not given City contracts, and that the contracts were awarded to higher bidders.

(2)

An affidavit by Marvin Gersten, dated May 1, 1967, was submitted on behalf of appellee Adler. It recites that Mr. Gersten is the Acting Commissioner of Purchase of the City of New York, that is, the superior of appellee Adler. It states that he has instructed Mr. Adler that persons or corporations who have refused to waive immunity before the grand jury investigating crimes in the milk industry are not to be automatically disqualified from being

awarded a City contract, and that they shall not be denied "the award of any city contract solely by reason of the fact that his or its name appears in a notice of refusal." It then directs that:

> "(b) Such persons or corporations listed in a notice of refusal shall be accorded a hearing at which an opportunity will be given to explain the refusal to waive immunity or to answer a question before the grand jury, investigating public contracts."

It goes on to state that, where such a person is the low bidder on a City contract, a Board of Responsibility shall be convened in accordance with a 1949 resolution of the New York City Board of Estimate. That resolution provided that such a bidder should be disqualified as a responsible bidder only upon the determination of such a board.

ARGUMENT

General Municipal Law, Section 103-b, is constitutional. Certainly it is constitutional as construed and applied by the City of New York and appellee Adler.

Slochower v. *Board of Education*, 350 U. S. 551 (1956), involved the dismissal of a teacher at a public college pursuant to Section 903 of theNewYork City Charter because he had refused, before a Congressional committee, to answer questions concerning membership in the Communist Party. The opinions of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. The opinion then said that Section 903,

as interpreted and applied, operated to discharge every employee who invoked the Fifth Amendment (p. 558). It went on to say that the questions asked were being taken as confessed and that no consideration was being given to such factors as the subject matter of the questions or justification for the exercise of the privilege.

It then said (p. 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.'"

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred. The other emphasized the automatic discharge for exercising the Fifth Amendment right before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer to consider the circumstances of the refusal to answer.

Other decisions of this Court hold that a public employee who fails to answer questions relating to his employment may be dismissed pursuant to a relevant statute if he has had an opportunity to explain his refusal at a hearing before an appropriate body. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A D 2d 737, 263 N.Y.S. 2d 360 (1965). The same rule was applied in the two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the petitioner Gardner was given a hearing and, thereafter, dismissed. *Matter of Gardner* v. *Broderick*, 27 A D 2d 800 (1967), affd. 20 N Y 2d 227 (1967).* The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A D 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending.

General Municipal Law, Section 103-b, is closely analogous to the Charter section just discussed. Its literal terms indicate that it mandates automatic disqualification. At present, however, the construction placed on it by the City of New York is similar to that now being given to the Charter section. In an affidavit in opposition to appellants' motions, the City's Acting Commissioner of Purchase described the practice which he has directed the appellee Adler, his subordinate, to follow. Under it there is no automatic disqualification for refusal to waive immunity before a grand jury. A hearing is granted at which an opportunity is given to explain the refusal to waive immunity or to answer questions before a grand

* This case is presently on appeal to this Court (No. 635).

jury investigating public contracts. And a low bidder on a City contract will not be disqualified unless, after such a hearing, a Board of Responsibility concludes that the bidder is not a responsible bidder.

Thus, it is not necessary to consider whether a statute which requires automatic disqualification would be valid. In the present case the only defendant who could apply General Municipal Law, Section 103-b, is the appellee Adler, who might apply it on behalf of the City of New York. And it is clear that he will not apply it as *automatically* disqualifying the appellants as sellers to the City. The other defendants, other than the intervenor-defendant, are the District Attorney of New York County and his assistants. They are parties because they have warned the appellants and perhaps others, who refused to waive immunity before the grand jury investigating price rigging and similar crimes in the milk industry of the disqualification provisions of the General Municipal Law section. The intervenor-defendant came into the case to support the validity of the statute.

We submit there is nothing in the cases decided by this Court that bars a city from refusing to purchase from a corporation whose officers have refused to testify before a grand jury investigating price rigging where, before such a refusal to purchase, the corporation is given a full opportunity to explain the failure to testify or otherwise to show that it is a responsible bidder.

Garrity v. *New Jersey*, 385 U. S. 493 (1967), has no direct relevance. At most it might furnish some support

for an argument that those who testify because of fear of the application of the General Municipal Law provision can have that testimony or any evidence obtained as a result of it excluded in a subsequent criminal case brought against them.

Spevack v. *Klein*, 385 U. S. 511 (1967), has some relevance, but it is readily distinguishable. The distinction is evidenced by the reservations, in footnote 3 of the majority opinion and in Justice FORTAS' concurring opinion, with regard to whether a public employee may be discharged for refusing to answer appropriate questions in disciplinary proceedings. The issue in the present case is, at least, as different from the issue decided in *Spevack* as the issue which this Court said it was not passing on.

The cloak of protection that this Court has provided those who invoke the Fifth Amendment is broad, but there would appear to be no valid reason to transform it into a bar against a reasonable investigation by governmental buyers of the reasons why those who wish to sell to them refused to testify in an investigation of price rigging. A statute, construed to require such an investigative hearing before disqualifying such sellers, does not violate the appellants' constitutional rights.

This Court has gone far in protecting such rights, but it has not and, we submit, should not add to such protection a bar against a reasonable investigation, under appropriate procedural safeguards, by a purchaser as to why one who wishes to sell goods to it has refused to testify concerning its selling practices.

CONCLUSION

The motion to affirm the order appealed from should be granted.

October 23, 1967.

Respectfully submitted,

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Samuel Adler.

NORMAN REDLICH,
STANLEY BUCHSBAUM,
MORGAN N. LIPTON,
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